

Senate Bill 527

This bill was formerly Section 5 of House Bill 425. It was removed from that bill to allow a review of the condominium exemption, only.

The Montana Supreme Court in *Shults v. Liberty Cove* recently ruled the term "divided in compliance with this chapter" found on lines 12 and 13 of the bill was not limited to subdividing, but included certificates of surveys, which are not reviewed for the protections of the Montana Subdivision and Platting Act. The underlined additions in the bill on line 13 return the code section to how it was formerly understood by most land use attorneys.

The committee amendment on line 13 was added at the request of the City of Missoula, to allow the exemption to be used in cities and towns where there is existing infrastructure.

Since the decision last October counties have seen an influx of condominium proposals which are not reviewed by the county commissioners and only have to be filed with the clerk and recorder. The governing body has no control over any aspect of these proposals. County commissioners are being threatened that subdividers will change their development to a condo project if the commissioners do not approve the subdivision application before them.

Condominiums have always been subdivisions under the Montana Subdivision and Platting Act

Attached is a copy of Chapter No. 500 from the 43rd legislative session in 1973. This is the original Subdivision and Platting Act. On page 1244, subsection (12) states twice that a subdivision includes any condominium—at the bottom of the page and at the top of the next page. Other intense uses of land that do not involve an actual division of land are also considered "subdivisions."

Also attached is a copy of 39 Op. Att'y Gen. No. 14 from 1981 in which the Montana Attorney General states on page 52 all the different activities that are deemed to be subdivisions. A division of land is only one, and you can see condominiums are listed. A condominium is more than a form of ownership.

This bill is designed to correct an incorrect interpretation of 76-3-203 by the Supreme Court and state the law in the way it has generally been understood since 1973.

CHAPTER NO. 500

An Act Requiring Local Governing Bodies to Adopt Subdivision Regulations and in Default Thereof Providing for the Promulgation of Departmental Minimum Requirements; Providing for the Submission of Environmental Assessments; Providing for the Administrative Establishment of Procedures and Requirements for Preparation of Subdivision Plats; Setting Forth Requirements for Surveying and Platting Divisions of Real Property and for Recording Surveys and Plats; Providing for Surveying, Platting, and Subdividing Generally; and Repealing Sections 11-601 through 11-616, 11-3843 through 11-3848 and 11-3851, R.C.M. 1947.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. This act may be cited as the "Montana Subdivision and Platting Act."

Section 2. It is the purpose of this act to promote the public health, safety, and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to encourage development in harmony with the natural environment; and to require uniform monumentation of land subdivisions and transferring interests in real property by reference to plat or certificate of survey.

Section 3. As used in this act, unless the context or subject matter clearly requires otherwise, the following words or phrases shall have the following meanings:

(1) "Certificate of survey" means a drawing of a field survey prepared by a registered surveyor for the purpose of disclosing facts pertaining to boundary locations.

(2) "Dedication" means the deliberate appropriation of land by an owner for any general and public use, reserving to himself no rights which are incompatible with the full exercise and enjoyment of the public use to which the property has been devoted.

(3) "Examining land surveyor" means a county surveyor or a registered land surveyor duly appointed to review surveys and plats submitted for filing.

(4) "Governing body" means a board of county commissioners or the governing authority of any city or town organized pursuant to law.

(5) "Planned unit development" means a land development

project consisting of residential clusters, industrial parks, shopping centers, or office building parks, or any combination thereof which comprises a planned mixture of land uses built in a prearranged relationship to each other and having open space and community facilities in common ownership.

(6) "Plat" means a graphical representation of a subdivision showing the division of land into lots, parcels, blocks, streets, and alleys, and other divisions and dedications.

(7) "Preliminary plat" means a neat and scaled drawing of a proposed subdivision showing the layout of streets, alleys, lots, blocks, and other elements of a subdivision which furnish a basis for review by a governing body; and the same shall be accompanied by any proposed covenants to run with the platted land and other elements of the proposed subdivision required to furnish a basis of review by the governing body.

(8) "Final plat" means the final drawing of the subdivision and dedication prepared for filing for record with the county clerk and recorder and containing all elements and requirements set forth in this act and in regulations adopted pursuant thereto.

(9) "Registered land surveyor" means a person licensed in conformance with the Montana Professional Engineers' Registration Act (sections 66-2301 through 66-2347) to practice surveying in the state of Montana.

(10) "Registered professional engineer" means a person licensed in conformance with the Montana Professional Engineers' Act (sections 66-2301 through 66-2347) to practice engineering in the state of Montana.

(11) "Subdivider" means any person who causes land to be subdivided or who proposes a subdivision of land.

(12) "Subdivision" means the division of land, or land so divided, into two (2) or more parcels, whether contiguous or not, any of which is ten (10) acres or less, exclusive of public roads, ways, in size, without regard to the method of description thereof, in order that the title or possession of the parcels or any interest therein may be sold, rented, leased, or otherwise conveyed either immediately or in the future, and shall include any resubdivision of land; and shall further include any condominium or areas providing multiple space for camping trailers, house trailers or mobile homes; provided further that a division of land is a subdivision when the division creates a second or any subsequent parcel for the purpose of sale, rent, lease, or other conveyance from a tract of land held in single or undivided ownership on July 1, 1973, where any of the parcels segregated from the original

tract is ten (10) acres or less, exclusive of public roadways, in size, without regard to the method of description thereof. The plat of a subdivision so created shall show all of the parcels segregated from the original tract whether contiguous or not.

"Subdivision" shall include any condominium or areas providing multiple space for camping trailers, house trailers, or mobile homes, regardless of the size of the parcel of land upon which the same is situated.

Section 4. (1) Except as provided herein, all division of real property made after June 30, 1973, into lots, tracts, or parcels any of which is ten (10) acres or less in size or the boundaries or area of which cannot be determined without a survey or trigonometric calculation, must be surveyed by or under the supervision of a registered surveyor; and a certificate of survey thereof must be completed by the surveyor and filed by him in the office of the county clerk and recorder of the county in which the real property lies.

(2) Every subdivision of land after June 30, 1973, shall be surveyed and platted in conformance with this act by or under the supervision of a registered land surveyor. Subdivision plats shall be prepared and filed in accordance with this act and regulations adopted pursuant thereto. Each subdivision plat must be accompanied by as complete a survey of the section or sections in which the subdivision is located as may be necessary to properly orient the subdivision within such section or sections. All division of sections into aliquot parts and retracement of lines must conform to United States bureau of land management instructions, and all public land survey corners shall be filed in accordance with the Corner Recordation Act of Montana (sections 67-2001 through 67-2019). Engineering plans, specifications, and reports required in connection with public improvements and other elements of the subdivision required by the governing body shall be prepared and filed by a registered engineer or a registered land surveyor as their respective licensing laws allow in accordance with this act and regulations adopted pursuant thereto.

(3) Instruments of transfer of land which is acquired for state highways may refer by parcel and project number to state highway plans which have been recorded in compliance with section 32-2413, and are exempted from the surveying and platting requirements of this act; provided, however, that if such parcels are not shown on highway plans of record, instruments of transfer of such parcels shall be accompanied by and refer to appropriate certificates of survey and plats when presented for recording.

(4) Unless the method of disposition is adopted for the pur-

pose of evading this act, the requirements of this act shall not apply to any division of land;

(a) which is created by order of any court of record in this state or by operation of law, or which, in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain (sections 93-9901 through 93-9926);

(b) which is created by a lien, mortgage, or trust indenture;

(c) which creates an interest in oil, gas, minerals, or water which is now or hereafter severed from the surface ownership of real property;

(d) which creates cemetery lots;

(e) which is made for the purpose of a gift or sale to any member of the landowner's immediate family;

(f) which is leased or rented for farming and agricultural purposes.

(5) The department of intergovernmental relations shall, in conformance with the Montana Administrative Procedure Act (sections 82-4201 through 82-4225), prescribe uniform standards for monumentation and for the form, accuracy, and descriptive content of records of survey.

(6) It shall be the responsibility of the governing body to require the replacement of all monuments removed in the course of construction.

Section 5. (1) The governing body of every county, city, and town shall, before July 1, 1974, adopt and provide for the enforcement and administration of subdivision regulations reasonably providing for the orderly development of their jurisdictional areas; for the coordination of roads within subdivided land with other roads, both existing and planned; for the dedication of land for roadways and for public utility easements; for the improvement of roads; for the provision of adequate open spaces for travel, light, air and recreation; for the provision of adequate transportation, water, drainage, and sanitary facilities; for the avoidance or minimization of congestion; and for the avoidance of subdivision which would involve unnecessary environmental degradation; and the avoidance of danger or injury to health, safety, or welfare by reason of natural hazard or the lack of water, drainage, access, transportation or other public services or would necessitate an excessive expenditure of public funds for the supply of such services.

Prior to adopting or amending subdivision regulations pursuant to this act, the governing body shall submit the proposed regulations or amendments to the division of planning and economic development of the department of intergovernmental relations for review.

Before the governing body adopts subdivision regulations pursuant to this section it shall hold a public hearing thereon and shall give public notice of its intent to adopt such regulations and of the public hearing by publication of notice of the time and place of the hearing in each newspaper published in the county not less than fifteen (15) nor more than thirty (30) days prior to the date of the hearing.

(2) Not later than December 31, 1973, the department of intergovernmental relations, through its division of planning and economic development, shall, in conformance with the Montana Administrative Procedure Act (sections 82-4201 through 82-4225), prescribe model subdivision rules and reasonable minimum requirements designed to promote the public health, safety and general welfare to be contained in, and those subject areas which must be addressed by, subdivision regulations adopted pursuant to this act. The subdivision rules and minimum requirements shall include detailed criteria for the content of the environmental assessment required by this act. The governing body shall provide for the review of preliminary plats by those agencies of state and local government and affected public utilities having a substantial interest in proposed subdivision; provided, however, that such agency or utility review shall not delay the governing body's action on the plat beyond the time limit specified herein, and the failure of any agency to complete a review of a plat shall not be a basis for rejection of the plat by the governing body.

(3) In prescribing the minimum contents of the subdivision regulations, the department of intergovernmental relations, through its division of planning and economic development, shall require the submission by the subdivider to the governing body of an environmental assessment.

(4) The environmental assessment shall accompany the preliminary plat and shall include:

(a) a description of every body of stream of surface water as may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation and wildlife use within the area of the proposed subdivision;

(b) maps and tables showing soil types in the several parts

of the proposed subdivision, and their suitability for any proposed developments in those several parts;

(c) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing, roads and maintenance, water, sewage, and solid waste facilities, and fire and police protection;

(d) such additional relevant and reasonable information as may be required by the department through its division of planning and economic development.

(5) Local subdivision regulations shall include procedures for the summary review and approval of subdivision plats containing five (5) or fewer parcels all of which front on an existing public road where no land in the subdivision will be dedicated to health and environmental sciences where such approval is required by sections 69-5001 through 69-5005; provided that reasonable local regulations may contain additional requirements for summary approval.

(6) Subdivision regulations may authorize the governing body to grant variances from the regulations when strict compliance will result in undue hardship and when it is not essential to the public welfare. Any variance granted pursuant to this section must be based on specific variance criteria contained in the subdivision regulations.

(7) Local regulations may provide that in lieu of the completion of the construction of any public improvements prior to the approval of a final plat, the governing body shall require a bond or other reasonable security, in an amount and with surety and conditions satisfactory to it, providing for and securing the construction and installation of such improvements within a period specified by the governing body and expressed in the bonds or other security.

(8) In the event that any governing body has not adopted subdivision regulations by July 1, 1974, which meet or exceed the prescribed minimum requirements, the department shall, through its division of planning and economic development, no later than January 1, 1975, promulgate reasonable regulations to be enforced by the governing body. If at any time thereafter the governing body adopts its own subdivision regulations, these shall supersede those promulgated by the department but shall be no less stringent.

Section 6. (1) A subdivision plat in which any lot is five (5) acres or less in size shall show that one-ninth (1/9) of the

platted area, exclusive of all other dedications, is forever dedicated to the public for parks and playgrounds.

A subdivision plat in which all lots shown are greater than five (5) acres in size shall show that one-twelfth (1/12) of the platted area, exclusive of all other dedications, is forever dedicated to the public for parks and playgrounds. There shall be no requirement for dedication of parks and playgrounds when the subdivision plat shows that all lots or parcels are greater than ten (10) acres in size. The governing body, in consultation with the planning board having jurisdiction, may determine suitable locations for such parks and playgrounds.

(2) Where, because of size, topography, shape, location, or other circumstances, the dedication of land for parks and playgrounds is undesirable, the governing body may, for good cause shown, make an order to be endorsed and certified on the plat accepting a cash donation in lieu of the dedication of land and equal to the fair market value of the amount of land that would have been dedicated. For the purpose of this section, the fair market value is the value of the undivided, unimproved land. Such cash donation shall be paid into the park fund to be used for the purchase of additional lands or for the initial development of parks and playgrounds.

(3) If the proposed plat provides for a planned unit development with land permanently set aside for park and recreational uses sufficient to meet the needs of the persons who will ultimately reside therein, the governing body may issue an order waiving land dedication and cash donation requirements.

(4) If a tract of land is being developed under single ownership as a part of an overall plan, and part of the tract has been subdivided and sufficient park lands have been dedicated to the public from the area that has been subdivided to meet the requirements of this section for the entire tract being developed, the governing body shall issue an order waiving the land dedication and cash donation requirements for the subsequently platted area.

(5) The local governing body may waive dedication and cash donation requirements where all of the parcels in a subdivision are five (5) acres or more in size and where the subdivider enters a covenant to run with the land and revocable only by consent of the governing body that the parcels in the subdivision will never be subdivided into parcels of less than five (5) acres and that all parcels in the subdivision will be used for single family dwellings.

Section 7. Where a subdivision platted under this act contains land to be dedicated to public use, the subdivider shall submit with the preliminary plat either:

(1) a certificate of a licensed title abstractor showing the names of the owners of record of the land to be dedicated and the names of lien holders or claimants of record against the land and the written consent to the dedication by the owners of the land, if other than the subdivider, and any lien holders or claimants of record against the land; or

(2) title insurance guaranteeing the public's interest in the dedicated land in a reasonable amount to be determined by the governing body.

Section 8. (1) Except where a plat is eligible for summary approval the subdivider shall present to the governing body, or the agent or agency designated thereby, the preliminary plat of the proposed subdivision for local review. When the proposed subdivision lies within the boundaries of an incorporated city or town, the preliminary plat shall be submitted to and approved by the city or town governing body. When the proposed subdivision is situated entirely in an unincorporated area the preliminary plat shall be submitted to and approved by the governing body of the county; however, if the proposed subdivision lies within one (1) mile of a third class city or town or within two (2) miles of a second class city or within three (3) miles of a first class city the county governing body shall submit the preliminary plat to the city or town governing body for review and comment. If the proposed subdivision lies partly within an incorporated city or town, the proposed plat thereof must be submitted to and approved by both the city or town and the county governing bodies. This section does not limit the authority of certain municipalities to regulate subdivisions beyond their corporate limits pursuant to section 11-3305.

(2) The governing body shall approve, conditionally approve, or reject the preliminary plat within sixty (60) days of its presentation. The preliminary plat shall show all pertinent features of the proposed subdivision and all proposed improvements. The governing body or its designated agent or agency shall review the preliminary plat to determine whether it conforms to the local master plan if one has been adopted pursuant to sections 11-3801 through 11-3856 to the provisions of this act, and to rules and regulations prescribed or adopted pursuant to this act.

(3) The governing body or its authorized agent or agency shall hold a public hearing on the preliminary plat and shall consider all relevant evidence relating to the public health, safety and welfare, including the environmental assessment, to determine whether the plat should be approved, conditionally approved, or disapproved by the governing body. Notice of such hearing shall be given by publication in a newspaper published in the county

not less than fifteen (15) days prior to the date of the hearing. When a hearing is held by an agent or agency designated by the governing body, the agent or agency shall act in an advisory capacity and recommend to the governing body the approval, conditional approval, or disapproval of the plat. This recommendation must be submitted to the governing body in writing not later than ten (10) days after the public hearing. If the governing body rejects or conditionally approves the preliminary plat, it shall forward one (1) copy of the plat to the subdivider accompanied by a letter over the appropriate signature stating the reason for rejection or enumerating the conditions which must be met to assure approval of the final plat.

(4) Upon approving or conditionally approving a preliminary plat, the governing body shall affix a dated and signed statement of approval to the preliminary plat. The governing body shall forward one (1) copy of the approval statement to the subdivider. This approval shall be in force for not more than one (1) calendar year; at the end of this period the governing body may, at the request of the subdivider, extend its approval for no more than one (1) calendar year.

Section 9. (1) All final subdivision plats shall be reviewed for errors and omissions in calculation or drafting by an examining land surveyor. He shall ascertain that all features, such as streets, drainage, and all other improvements and facilities to be operated or maintained with public funds, are essentially the same as those shown on the approved preliminary plat; that the permanent control monuments meet requirements prescribed pursuant to this act; that all exterior boundaries and corners of the tract are shown in sufficient detail so as to leave no doubt as to how they were established; and that all monuments and references promulgated pursuant to this act. When the survey data shown on the plat meet the conditions set forth by or pursuant to this act, the examining land surveyor shall so certify in a printed or stamped certificate on the plat; such certificate shall be signed by him.

No land surveyor shall act as an examining land surveyor in regard to a plat in which he has a financial or personal interest other than as draftsman of the plat.

(2) The governing body shall examine every final subdivision plat and shall approve it when, and only when, it conforms to the conditions of approval set forth on the preliminary plat and to the terms of this act and regulations adopted pursuant thereto. The clerk and recorder of the county shall refuse to

accept any plat for record that fails to have such approval in proper form.

(3) Every final subdivision plat must be filed for record with the county clerk and recorder before any interest in the subdivided land can be sold, rented, leased, or transferred in any manner or offered for sale, lease, or transfer. If illegal transfers or offers of any manner are made, the county attorney shall commence action to enjoin further sales, transfers, or offers of sale or transfer and compel compliance with all provisions of this act. The cost of such action shall be imposed against the person transferring or offering to transfer the property.

Section 10. The governing body may establish reasonable fees to be paid by the subdivider to defray the expense of reviewing subdivision plats.

Section 11. All covenants shall be considered to run with the land, whether marked or noted on the subdivision plat or contained in a separate instrument recorded with the plat.

Section 12. (1) Any plat prepared and recorded as herein provided may be vacated either in whole or in part as provided by sections 11-2801 and 11-2803, and upon such vacation the title to the streets and alleys of such vacated portions to the center thereof shall revert to the owners of the properties within the platted area adjacent to such vacated portions; provided however, that when any pole line, pipe line, or any other public or private facility that is located in a vacated street or alley at the time of the reversion of the title thereto, the owner of said public or private utility facility shall have an easement over the vacated land to continue the operation and maintenance of the public utility facility.

(2) All plats and other title records which were recorded prior to the effective date of this act in accordance with the law in force at the time of recording and which have not been subsequently vacated are hereby validated, notwithstanding irregularities, and have the same legal status as plats recorded under the provisions of this act.

(3) The recording of any plat made in compliance with the provisions of this act shall serve to establish the identity of all lands shown on and being a part of such plat. Where lands are conveyed by reference to a plat, the plat itself or any copy of the plat properly certified by the county clerk and recorder as being a true copy thereof, shall be regarded as incorporated into the instrument of conveyance and shall be received in evidence in all courts of this state.

Section 13. Every donation or grant to the public, or to any person, society, or corporation, marked or noted on a plat is to be considered a grant to the donee.

Section 14. (1) Within one hundred eighty (180) days of the completion of a survey the registered land surveyor responsible for the survey, whether he is privately or publicly employed, shall prepare and file for record a certificate of survey in the county in which the survey was made if the survey:

(a) provides material evidence not appearing on any map filed with the county clerk and recorder or contained in the records of the United States bureau of land management;

(b) reveals a material discrepancy in such map;

(c) discloses evidence to suggest alternate locations of lines or points;

(d) establishes one or more lines not shown on a recorded map the positions of which are not ascertainable from an inspection of such map without trigonometric calculations.

(2) A certificate of survey will not be required for any survey which is made by the United States bureau of land management or which is preliminary or which will become part of a subdivision plat being prepared for recording under the provisions of this act.

(3) Certificates of survey shall be legibly drawn, printed, or reproduced by a process guaranteeing a permanent record and shall conform to monumentation and surveying requirements promulgated under this act.

Section 15. The county clerk and recorder shall maintain an index of all recorded subdivision plats and certificates of survey. This index shall list plats and certificates of survey by the quarter section, section, township, and range in which the platted or surveyed land lies and shall list the recording or filing numbers of all plats depicting lands lying within each quarter section. Each quarter section list shall be definitive to the exclusion of all other quarter sections. The index shall also list the names of all subdivision plats in alphabetical order and the place where filed.

Section 16. When a recorded plat does not definitely show the location or size of lots or blocks, or the location or width of any street or alley, the governing body may at its own expense cause a new and correct survey and plat to be made and recorded in the office of the county clerk. The corrected plat must, to the extent possible, follow the plan of the original survey and plat. The surveyor making the resurvey shall endorse the corrected plat

referring to the original plat and noting the defect existing therein and the corrections made.

Section 17. Every registered land surveyor may administer and certify oaths:

(1) when it becomes necessary to take testimony for the identification of old corners or reestablishment of lost or obliterated corners;

(2) when a corner or monument is found in a deteriorating condition and it is desirable that evidence concerning it be perpetuated;

(3) when the importance of the survey makes it desirable to administer an oath to his assistants for the faithful performance of their duty.

A record of oaths shall be preserved as part of the field notes of the survey, and noted on the certificate of survey filed under this section.

Section 18. Any person who violates any provision of this act or any local regulations adopted pursuant thereto shall be guilty of a misdemeanor and punishable by a fine of not less than one hundred dollars (\$100) or more than five hundred dollars (\$500) or by imprisonment in a county jail for not more than three (3) months, or by both fine and imprisonment. Each sale, lease or transfer, or offer for sale, lease, or transfer of each separate parcel of land in violation of any provision of this act or any local regulation adopted pursuant thereto shall be deemed a separate and distinct offense.

Section 19. If any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Section 20. Sections 11-601 through 11-616, 11-3843 through 11-3848, and 11-3851, R.C.M. 1947, are repealed.

Approved: April 2, 1973.

CHAPTER NO. 601

An Act Providing for the Issuance of Bonds By Airport Authorities; Amending Sections 1-804, 1-912 and 1-916, R.C.M. 1947. Be it enacted by the Legislative Assembly of the State of Montana:

CHAPTER 501

Section 1. Section 1-912, R.C.M. 1947, is amended to read as follows:

"1-912. Bonds and other obligations. (1) An authority shall have the power to borrow money for any of its corporate purposes and issue its bonds therefor, including refunding bonds, in such form and upon such terms as it may determine, payable out of any revenues of the authority, including revenues derived from:

(a) an airport or air navigation facility or facilities,
(b) taxes levied pursuant to section 1-916, or other law, for airport purposes,

(c) grants or contributions from the federal government or
(d) other sources.

The bonds may be issued by resolution or resolutions of the authority, without an election, and without any limitation of amount except as follows: No such bonds shall be issued at any time if the total amount of principal and interest to become due in any year on such bonds, and on any then outstanding bonds for which revenues from the same source or sources are pledged, exceeds the amount of such revenues to be received in that year as estimated in the resolution authorizing the issuance of the bonds; and the authority shall be obligated to take all action necessary and possible to impose, maintain and collect rates, charges, rentals and taxes, if any are pledged, sufficient to make the revenues from the pledged source or sources in such year at least equal to the amount of such principal and interest due in that year. They may be sold at public or private sale and shall bear interest at a rate or rates not exceeding ten per centum (10%) per annum. Except as otherwise provided herein, any bonds issued pursuant to this chapter by an authority shall be payable as to principal and interest solely from revenues of the authority, and shall state on their face the applicable limitations or restrictions regarding the source or sources from which such principal and interest are payable.

Bonds issued by an authority or municipality pursuant to the provisions of this chapter are declared to be issued for an essential public and governmental purpose by a political subdivision within the meaning of section 84-4905(2)(a).

For the security of any such bonds, the authority or municipality may by resolution make and enter into any covenant, agreement, or indenture and exercise any additional powers authorized to be made, entered into or exercised by a municipality under title 11, chapter 24. The sums required from time to time to pay principal and interest and to create and maintain a reserve for the

instance, under section 7-22-2146, MCA, county commissioners and weed control supervisors are clearly not required to have an agreement to assist landowners with weed control. Therefore, the landowners in counties without such agreements are obliged to carry the entire financial burden of the weed program. If section 7-22-2147, MCA, were then interpreted to allow recovery by the county of only two-thirds of the costs incurred in destroying weeds on the property of noncomplying landowners, it would be economically advantageous for the landowners to refuse to cooperate in the program. Complying landowners would bear their total cost of weed control, while recalcitrant landowners would be liable for only two-thirds of the expenses. THEREFORE, IT IS MY OPINION:

In counties in which the full financial responsibility for a weed control program lies with the landowners, the county may recover the full amount of the cost incurred in noxious weed control when the weed board must institute weed control measures pursuant to section 7-22-2124, MCA, without the consent of the owner.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 39

OPINION NO. 14

LOCAL GOVERNMENT - Subdivisions, authority to review state activities;
RECREATION - State campgrounds, subdivisions, local review;
SUBDIVISIONS - State campgrounds, local review;
MONTANA CODE ANNOTATED - Sections 76-3-101, et seq.; 87-1-209.

HELD: The Department of Fish, Wildlife, and Parks is subject to local subdivision review under sections 76-3-101, et seq., MCA, to the extent that it is creating an area which provides or will provide multiple spaces for recreational camping vehicles.

27 April 1981

Morris Bruset, Director
Department of Administration
S.W. Mitchell Building
Helena, Montana 59601

Dear Mr. Bruset:

You have requested my opinion on the following question:

Is the proposed extension of the facilities at the Lambeth State Recreation Area subject to local review under the Subdivision and Platting Act?

The Department of Fish, Wildlife and Parks (DFWP) has proposed several improvements to the Lambeth State Recreation Area on the shores of Lake Mary Ronan in Lake County. In addition to a new well and caretaker facilities, DFWP proposes to construct several new campsites at Lambeth. Lake County asserts that this activity falls under the Subdivision and Platting Act, § 76-3-101, et seq., MCA, and DFWP, under a variety of theories, argues to the contrary.

The Subdivision and Platting Act generally requires local review and approval of all subdivisions (§ 76-3-601, MCA). All local governments are required to adopt and enforce subdivision regulations (§ 76-3-501, MCA). Some subdivisions may be reviewed in an abbreviated procedure (§ 76-3-505, MCA), and some subdivision activities are wholly exempt from regulations (§§ 76-3-201, et seq., MCA). DFWP, on the other hand, has express authority, with the consent of the Fish and Game Commission, to acquire and develop areas for state parks and recreation areas (§ 87-1-209, MCA).

The present issue is to what extent, if any, the DFWP's activities in expanding Lambeth are subject to regulation as a subdivision by Lake County. While the statutes are not a model of clarity, a coherent construction of legislative intent can be derived. Section 76-3-103(15), MCA, defines the term "subdivision" as follows:

"Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of

public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles, or mobile homes.

On its face this section provides that the following activities are deemed to be subdivisions:

1. A division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed.
2. Any resubdivision.
3. Any condominium.
4. Any area, regardless of size, which provides or will provide multiple space for recreational camping vehicles.
5. Any area, regardless of size, which provides or will provide multiple space for mobile homes.

It is instructive that the original statute (1973 Mont. Laws, ch. 500, § 3) listed condominiums, camping spaces and mobile home sites in a separate sentence, clearly indicating an intent to create a separate class of subdivision activity not necessarily requiring a "division of land." The fact that the language is now all in one sentence does nothing to change the original intent that there are activities deemed to be subdivisions which do not require a division of land.

Section 76-3-104, MCA, immediately following, provides that a subdivision "shall comprise only those parcels less than 20 acres which have been segregated from the original tract...." While this limitation is somewhat confusing, it is clear that it does not apply to categories 4 and 5 of the "subdivision" definition listed above. Those categories of activities or land

uses are subdivisions "regardless of...size." Thus, it is clear that if a private individual wished to construct a recreational vehicle camping area on the banks of Lake Mary Roman, local subdivision review would be required. The question, then, is whether under the statute or the law DFWP is exempted from local review when doing the same thing. I conclude that there is no exemption.

Activities by the State are mentioned twice in the Act. Section 76-3-205, MCA, provides:

The provisions of this chapter shall not apply to the division of state-owned land unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974.

This section provides an exemption for certain State activities and an express inclusion of others. It exempts an initial division of state-owned land. A "division of land" is defined in section 76-3-103(3), MCA, and requires segregation of one or more parcels from a larger tract by transferring title or possession. This clearly refers to activities in the first category of covered subdivision activities. The effect of section 76-3-205, MCA, is to allow the State to subdivide and sell one tract from a parcel without local regulation, but to require local review of any subsequent divisions from the same parcel. Similarly, section 76-3-209, MCA, exempts from the survey and platting requirements, lands acquired for state highways.

These two sections, especially section 76-3-205, MCA, are a persuasive indication that the Legislature intended state activities to be covered by the Act. If state activities were intended to be exempt as a blanket matter, there would have been no reason to adopt section 76-3-205, MCA, granting an exemption for certain state activities. While section 76-3-209, MCA, is an exemption not so much for the State as for the person transferring the land, it is a specific and narrow exemption. Thus, since the Legislature chose to mention the State in the Act, and chose to grant exemptions in its favor only in two specific instances, the clear implication is a legislative intent that the State stands in the same footing as a private person in all other matters under the Act.

Section 76-3-201, MCA, creates one additional exemption which should be discussed. That section exempts from review any "division of land" which "in the absence of agreement between the parties to the sale, could be created by an order of any court in this state pursuant to the law of eminent domain...." It has been suggested that since DFWP could have acquired this property on Lake Mary Roman by eminent domain (§ 87-1-209, MCA), this exemption applies. This is incorrect for two reasons. First, section 76-3-201, MCA, applies expressly to "division of land." As noted above, the instant situation does not involve a division of land, even though it does involve "subdivision" activity. Second, exemptions of this type operate primarily upon the seller of land. That is, if DFWP were acquiring a piece of property on the lake, section 76-3-201, MCA, would probably allow the seller to complete the transaction without local subdivision review and would not directly affect DFWP. That, however, is not the current situation. The land is already owned by DFWP and it wants to engage in a subsequent land use which triggers local subdivision review. Section 76-3-201, MCA, would apply to the original acquisition, but not subsequent uses.

Therefore, the statutes contemplate coverage of state activities, and no applicable statutory exemptions can be found. There remains, however, the question of whether there are general principles of law which would exempt DFWP from local regulation. While no cases could be found dealing with state-local conflicts under subdivision statutes, there is a considerable body of law dealing with state-local conflicts under zoning ordinances. The "traditional view" is that activities regulation on the theory that the State is the superior sovereign. The analysis and language is much like that found in cases dealing with federal supremacy over state law. See, e.g., Board of Regents v. Tempe, 356 P.2d 399, 406 (Ariz. 1960); Anderson, American Law of Zoning, § 12.06, et seq.

The more recently decided cases show a clear trend toward abandoning the traditional view. In Dearden v. Detroit, 269 N.W.2d 139, 140 (Mich. 1978), the court analyzed and rejected all the traditional mechanical theories for finding state freedom from local control. To the same effect see City of Pittsburg v.

Commonwealth, 360 A.2d 607 (Pa. 1976); City of Temple Terrace v. Hillsborough Ass'n, 322 So. 2d 571 (Fla. App. 1975), aff'd, 332 So. 2d 610 (Fla. 1976); Brown v. Kansas Forestry, Fish & Game Comm., 576 P.2d 230 (Kan. 1978). As the court persuasively argued in City of Pittsburg v. Commonwealth, supra, viewing the conflict as a state-local one is unrealistic since both the local government and the state agency are exercising powers that come from the legislature.

Thus, the first task is simply to determine legislative intent from the applicable statutes. Where there is a discernible intent as to whether the state agency should be subject to local control, that is the end of the matter. See, e.g., Dearden v. City of Detroit, supra. As discussed above, the statutes in the instant case indicate a legislative intent that the state not be immune from local regulation.

In situations in which the legislature is silent, the courts have adopted a balancing of interests test. See City of Temple Terrace v. Hillsborough Ass'n, supra; Rutgers v. Piluso, 286 A.2d 697 (N.J. 1972); Brown v. Kansas Forestry, supra. Even though legislative intent is discernible in the present case, the balancing test as applied in these cases also leans toward the applicability of local regulation. The test announced in Rutgers, and followed in Brown, looks at the following factors:

1. The nature and scope of the instrumentality seeking immunity;
2. The kind of function or land use involved;
3. The extent of public interest to be served thereby;
4. The effect local land use regulation would have upon the enterprise; and
5. The impact upon legitimate local interests.

In the present case the agency seeking immunity is a state agency empowered to acquire and develop land for recreational uses. This function is obviously in the

c interest, but, as the court in Brown observed, not rise to the level of public education or actions. In the latter areas the courts have been more willing to find that important state goals be frustrated by local regulation. See, e.g., In v. City of Detroit, supra. Third, there is an public interest in outdoor recreation facilities. There is, however, an existing facility at site in question and even if the local review resulted in a rejection of the new camping the existing facility and the remainder of the improvements would be unaffected. Fourth, the local land use regulation would have on this agency's project is directly prohibited by the regulations. This is not the case here; we are dealing with an all or nothing situation. The on is not whether or not the project is prohibited whether or not it must be subjected to local . Lastly, the impact upon legitimate local sts is great. As noted above, the State has ad that local governments adopt subdivision regu s to further the comprehensive purposes listed in 176-3-102, MCA. These purposes are all related ly to local impacts, and the Legislature has ined that the local governments are best able to ce those impacts.

uld be clear that the balancing of interests test heavily in favor of local regulations. As noted e cases, however, susceptibility to local ion cannot be construed as a green light for efforts to stop state developments. The State, a private developer, has every right to expect and fair and impartial treatment. There is no ion in this case that the local government will more than fulfill its statutory responsibilities.

RE: IT IS MY OPINION:

e Department of Fish, Wildlife, and Parks is ject to local subdivision review under sections -3-101, et seq., MCA, to the extent that it is ating an area which provides or will provide ltiple spaces for recreational camping vehicles.

ily yours,

ELLY
General

VOLUME NO. 39

OPINION NO. 15

EMPLOYEES, PUBLIC - Rate of expenditure of accrued leave credits when changing from eight-hour to ten-hour working day;
SICK LEAVE - Rate of expenditure of accrued leave credits when changing from eight-hour to ten-hour working day;
VACATIONS - Rate of expenditure of accrued leave credits when changing from eight-hour to ten-hour working day;
ADMINISTRATIVE RULES OF MONTANA - Sections 2.21.122(b), 2.21.135, 2.21.143, 2.21.216(7), 2.21.233, 2.21.288; MONTANA CODE ANNOTATED - Sections 2-4-302, 2-18-604, 2-18-612, 2-18-618, 39-3-405.

HELD:

Accrued employee leave time is calculated on a hourly basis for the purpose of determining the amount of leave time credited to employees who change from an eight-hour work day to a ten-hour work day.

12 May 1981

John N. Radonich, Esq.
Anaconda-Deer Lodge County Attorney
108 East Park Avenue
Anaconda, Montana 59711

Dear Mr. Radonich:

You have requested my opinion on the following question:

When an employee has accrued days of vacation and sick leave on a schedule of eight-hour working days is the accrued leave expended on a daily basis or an hourly basis when the employee changes to a schedule of four ten-hour working days per week?

A review of the facts of your situation and the pertinent statutes is necessary to fully understand your question. Section 2-18-612, MCA, provides that an employee earns vacation leave credits at the rate of fifteen working days per year for the first ten years of service, eighteen days per year for the next five years, twenty-one days per year for the next following five